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Maxwell & Morgan, P.C., erroneously sued
as Maxwell & Morgan, Corp.*

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

* * *

Glenkirk D. Peters,

Plaintiff,

vs.

Maxwell & Morgan, Corp.,

Defendants.

CASE NO.: 2:18-cv-01399-GMN-GWF
**REPLY MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT
OF DEFENDANT'S MOTION TO
STAY DISCOVERY PENDING
RESOLUTION OF MOTION TO
DISMISS FIRST AMENDED
COMPLAINT**

ORAL ARGUMENT REQUESTED

1 **I. INTRODUCTION**

2 Plaintiff Glenkirk D. Peters (“Peters”) does not deny that Defendant Maxwell
3 & Morgan, P.C.’s, erroneously sued as Maxwell & Morgan, Corp. (“M&M”),
4 pending Motion to Dismiss is dispositive of the entire case. Instead, he argues that
5 M&M’s motion for stay of discovery should be denied because 1) the Motion to
6 Dismiss purportedly raises “factual issues” that require discovery, 2) the Motion to
7 Dismiss will likely be denied, and 3) he will suffer undue prejudice if discovery is
8 stayed. None of the arguments have merit.

9 M&M’s pending Motion to Dismiss does not challenge **any** of the factual
10 allegations of the First Amended Complaint (“FAC”). To the contrary, even
11 assuming the truth of these allegations, Peters’s claims fail as a matter of law.
12 Specifically, M&M argued that there was no requirement that the firm “domesticate”
13 the Arizona Judgment¹ in Nevada before filing a garnishment action against Peters’s
14 employer and serving his employer with the Writ in Arizona. Peters has not identify
15 any discovery that bears on this purely legal question. As such, no discovery is
16 necessary for the Court to resolve M&M’s pending Motion to Dismiss.

17 Even a “preliminary peek” at the pending Motion to Dismiss indicates that it
18 will likely be granted. Neither the UEFJA² nor N.R.C.P.³ apply to an Arizona wage
19 garnishment that is properly filed and served on the garnishee in Arizona under that
20 states rules. The Writ of Garnishment was properly issued by the Arizona state court
21 and enforced against the garnishee (Peters’s employer) in compliance with Arizona
22 law. M&M required to “domesticate” the Arizona judgment in Nevada as Peters

23
24 ¹ The terms “Arizona Judgment,” “Writ,” “Arizona Action,” “Garnishment
25 Application,” and “Phoenix Address have the meaning as used in M&M’s Motion to
Dismiss. *See* Doc. No. 20 at ECF pp. 4:13-5:7.

26 ² Uniform Enforcement of Foreign Judgments Act (“UEFJA”), codified at N.R.S.
27 §§ 17.330 through 17.400.

28 ³ Nevada Rules of Civil Procedure (“N.R.C.P.”).

1 suggests. Given Peters's claims rest entire on this misinterpretation of law, the
2 Motion to Dismiss will likely dispose of the entire case.

3 Peters will not suffer any undue prejudice if discovery is stayed. He has not
4 even identified any discovery that he needs, let alone explained why he needs it now.
5 In fact, he has effectively conceded that his wages are no longer being garnished,
6 which further cuts against his "urgency" argument. Nor has he explained how a stay
7 of discovery in this action would impact the proceedings in the ongoing state court
8 litigation. It will not.

9 A stay of discovery is warranted and consistent with the goal of Rule 1 of the
10 Federal Rules of Civil Procedure.

11 **II. ARGUMENT**

12 **A. The Motion To Dismiss Does Not Raise Any "Factual Issues" And** 13 **Peters Does Not Identify Any Discovery That Bears On The Purely** **Legal Issues Raised In The Motion**

14 Peters claims that discovery should not be stayed because M&M's Motion to
15 Dismiss purportedly "raises factual issues" and "challenges the factual allegations"
16 of the First Amended Complaint ("FAC"). *See* Doc. No. 30 at pp. 7:17-8:13.
17 According to him, discovery is needed "to confirm that Caesars is in Nevada and/or
18 that [M&M] knew that [he] lived, worked, and earned his wages in Nevada." *Id.* at
19 p. 8:9-10. He is incorrect.

20 M&M's Motion to Dismiss **does not** challenge **any** of the factual allegations
21 of the FAC. The exact opposite is true. M&M has assumed – for purposes of its
22 Motion to Dismiss only – that Peters lived, worked and earned his wages in Nevada
23 during the relevant time, and that his employer (Caesars Entertainment) is also
24 located in the state.

25 The Motion to Dismiss argues that, even assuming the truth of those
26 allegations, there was no requirement that the firm "domesticate" the Arizona
27 Judgment in Nevada before filing a garnishment action against his employer and
28 serving his employer with the Writ in Arizona. *See* Doc. No. 20 at ECF pp. 8:4-12,

9:1-12:2.⁴ As M&M explained, the service of the Writ on Peters’s employer in Arizona was proper because his employer was subject to personal jurisdiction in Arizona. *Id.* at pp. 7:18-8:28; Doc. No. 26 at pp. 4:1-5:23, 8:1-9:7. Whether or not Nevada’s UEFJA or N.R.C.P required the Arizona Judgment to also be “domesticated” in Nevada under these alleged facts is a purely legal question for the Court to decide. Moreover, there is no dispute that if the Court agrees with M&M, Peters’s claims fail and the case will end.

No discovery is needed for the Court to resolve the purely legal question raised in M&M’s Motion. *See Jarvis v. Regan*, 833 F.2d 149, 155 (9th Cir. 1987) (Where a complaint is challenged as “deficient as a matter of law,” discovery is not required for the resolution of that motion.).⁵ Tellingly, Peters does not identify any discovery he purportedly needs that bears on this issue. There is none.

M&M’s Motion to Dismiss “presents a dispositive legal question that would resolve [Peters’s] claims without the need for discovery.” *See 5035 Vill. Tr. v. Durazo*, 2016 WL 6246304, at *3 (D. Nev. Oct. 24, 2016) (granting discovery stay pending outcome of dispositive motion). A temporary stay of discovery until the Court resolves this threshold, dispositive legal issue “will further the goals of judicial

⁴ Peters does not dispute that his employer has a registered agent for service of process in Arizona or that the Writ was served on his employer’s registered agent in the state. *See* Doc. No. 20-1 at Ex. H.

⁵ *See also Tradebay, LLC v. eBay, Inc.*, 278 F.R.D. 597, 608 (D. Nev. 2011) (“The motion raises no factual issues, and will be decided purely on issues of law. This case is currently at the pleading stage and the Ninth Circuit has held that the purpose of Rule 12(b)(6) is to enable Defendants to challenge the legal sufficiency of a complaint without subjecting themselves to discovery.”); *Rae v. Union Bank*, 725 F.2d 478, 481 (9th Cir. 1984) (“Here, there were no factual issues. The district court took all the facts alleged in the complaint as true and decided that the facts as alleged did not add up to either an anti-tying claim or a civil RICO claim. Rae has failed to point to any specific information obtainable through discovery that would have enabled appellants to state a federal cause of action.”).

economy and control of the Court's docket." *See Kidneigh v. Tournament One Corp.*, 2013 WL 1855764, at *3 (D. Nev. May 1, 2013) (same). Accordingly, this motion should be granted and discovery should be temporarily stayed.

B. M&M's Motion To Dismiss Will Be Granted Because Peters's Claims Fail As A Matter Of Law

Peters spends most of his Opposition arguing that a stay of discovery is inappropriate because M&M will not prevail on its Motion to Dismiss. *See* Doc. No. 30 at ECF pp. 8:14-14:3. His brief simply rehashes the arguments made in response to M&M's Motion. *Compare* Doc. No. 21 at ECF pp. 8:1-17:11 *with* Doc. No. 30 at ECF pp. 8:14-14:3. As discussed in M&M's Motion and Reply, he is incorrect. *See* Doc. Nos. 20 & 26.

It is true that this Court can take a "preliminary peek" at whether M&M will prevail on its Motion to Dismiss in connection with deciding whether to stay discovery. *See Davis v. Nevada*, 2014 WL 1308347, at *2-4 & nn.2-3 (D. Nev. Mar. 31, 2014). The "preliminary peek," however, "is not intended to predict the outcome of the motion, but rather to evaluate whether a stay is consistent with the goal of the Federal Rules of Civil Procedure of securing a just, speedy and inexpensive determination of the case." *Id.*

M&M submits that even a "preliminary peek" into the merits of its Motion to Dismiss reveals that the claims in the FAC fail as a matter of law. Regardless, at a minimum, the Motion shows that a stay of discovery is appropriate until the Court decides the threshold legal issue.

As discussed more fully in M&M's Motion and Reply, neither the UEFJA nor N.R.C. P. apply to an Arizona wage garnishment that is properly filed and served on the garnishee in Arizona under that states rules. *See* Doc. No. 20 at ECF pp. 7:18-12:2; Doc. No. 26 at ECF pp. 3:9-10:2. That is precisely what M&M did here. The UEFJA and N.R.C.P. only apply to out-of-state judgments that are filed in a Nevada court. *Id.* Nothing in the UEFJA purports to govern a garnishment action filed in

1 Arizona in which the writ of garnishment is properly served on the garnishee in that
2 state. *Id.*

3 The Writ was properly issued against Peters's employer by an Arizona court
4 and enforced in Arizona pursuant to Arizona law. *See* Doc. No. 20 at ECF pp. 7:18-
5 8:28; Doc. No. 26 at ECF pp. 3:9-5:23, 8:1-10:2. The garnishment was proper in
6 Arizona because the garnishee (Peters's employer) was subject to personal
7 jurisdiction in Arizona. *Id.* Personal jurisdiction was established over Peters's
8 employer when the Writ was served on the employer's authorized agent at the
9 Phoenix Address. *Id.*; *Ellsworth Land & Livestock Inc. v. Bush*, 233 P.3d 655, 657-
10 58 (Ct. App. 2010) ("*Ellsworth*") (following Section 68 of the Restatement (Second)
11 of Conflict of Laws ("Restatement Section 68) and holding Arizona writ of
12 garnishment compelling garnishing to remit out of state funds to judgment-creditor
13 was proper because Arizona had personal jurisdiction over garnishee).⁶ Accordingly,
14 M&M properly sought to enforce the judgment in Arizona by way of the Writ served
15 on his employer in Arizona.⁷

16
17 ⁶ M&M pointed out in its Reply brief that, like Arizona, Nevada also follows
18 Restatement Section 68) as the Nevada Supreme Court stated in *Pacific Western Bank*
19 *v. Eighth Judicial District Court*, 383 P.3d 252, 255-56 (Nev. 2016) ("*Pacific Western*
20 *Bank*"). *See* Doc. No. 26 at ECF pp. 4:1-5:23. Peters is flatly wrong that *Pacific*
21 *Western Bank* supports his position. *See* Doc. No. 30 at n.6. Just like the out-of-state
22 annuity payments in *Ellsworth* and the out-of-state accounts in *Pacific Western Bank*,
23 the wages Peters is owed from his employer are akin to "debt." *See* Doc. No. 26 at ECF
pp. 3:9-5:23. As a result, Restatement Section 68 applies and the fact that Peters's
wages are allegedly located outside of Arizona is irrelevant. *See Ellsworth*, 233 P.3d
at 657-58; *Pacific Western Bank*, 383 P.3d at 255-56.

24 ⁷ Just like he did in his Opposition to the Motion to Dismiss, Peters makes
25 baseless accusations about the propriety of the method of service that resulted in the
26 entry of the Arizona Judgment and claims that failing to domesticate the judgment in
27 Nevada deprived him of certain notices. *See* Doc. No. 30 at ECF pp. 12:22-13:5.
28 Neither of these allegations are relevant to the claims pled in the FAC, nor do they have
anything to do with the legal issue raised in M&M's Motion to Dismiss. Regardless, as
M&M explained in its Reply, Peters was given proper notice and opportunity to object

1 M&M is highly likely to prevail on its Motion to Dismiss. Peters's FDCPA⁸
 2 claims (the only ones left in this case) are based on a fundamental misinterpretation
 3 of Nevada and Arizona law.⁹ As a result, a brief stay of discovery is appropriate
 4 until the Court rules.¹⁰

5 //

6 //

7 //

8 _____
 9 to the garnishment consistent with Arizona's garnishment procedures. *See* Doc. No. 26
 10 at ECF pp. 9:8-10:2. Additionally, the judgment was properly obtained and to the extent
 11 he claims it was not, his attack on the judgment is barred under the *Rooker-Feldman*
 doctrine. *Id.* at ECF p. 10:22-28.

12 ⁸ Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.* ("FDCPA").

13 ⁹ It makes no difference that the FDCPA is purportedly a "remedial" and "strict
 14 liability" statute, as Peters contends. *See* Doc. No. 30 at ECF pp. 13:6-14:3. There must
 15 be some misconduct to establish liability under the statute. Here, M&M enforced the
 16 Arizona Judgment in Arizona in compliance with Arizona law. There was no
 17 misconduct whatsoever. Peters also continues to wrongly claim that whether M&M
 18 violated sections 1692e and 1692f of the FDCPA is a question for the jury. *See* Doc.
 19 No. 30 at p. 11:18-21. As explained in M&M's Reply brief, this is a question of law for
 the Court. *See* Doc. No. 26 at ECF p. 8:24-28; *Gonzales v. Arrow Fin. Servs., LLC*, 660
 F.3d 1055, 1061 n.3 (9th Cir. 2011).

20 ¹⁰ *See, e.g., Hardy v. Global Options Servs., Inc.*, 2013 WL 6059154, *2 (D. Nev.
 21 2013) (granting order staying discovery: "Plaintiff's defamation claim, as currently
 22 stated, is not likely to survive under the Rule 12(b)(6) standard"); *Rizzolo v. Henry*,
 23 2013 WL 1890665, *6 (D. Nev. 2013) (granting order staying discovery: "Plaintiff's two
 arguments against dismissal based on issue preclusion will likely fail."); *Stephens v.*
 24 *LVNV Funding, LLC*, 2013 WL 1069259, *5 (D. Nev. 2013) (granting order staying
 25 discovery: "After taking a 'preliminary peek' into the pending motion to dismiss (#13),
 the court finds that staying discovery is warranted [citation omitted]. The motion (#13)
 26 could be potentially dispositive of all of plaintiff's claims against the defendant");
 27 *Ministerio Roca Solida v. U.S. Dep't. of Fish & Wildlife*, 288 F.R.D. 500, 502 (D. Nev.
 28 2013) (granting order staying discovery: "The purpose of Federal Rule of Civil
 Procedure 12(b)(6) is to enable defendants to challenge the legal sufficiency of a
 complaint without subjecting themselves to discovery").

C. A Brief Stay Of Discovery Until The Court Rules On The Motion To Dismiss Will Not Prejudice Peters

Peters argues that he will “suffer unnecessary prejudice” if discovery is stayed. *See* Doc. No. 30 at p. 14:4. Even assuming “prejudice” is relevant to the analysis, he is wrong.¹¹

As discussed above, Peters does not identify any discovery he needs that bears on M&M’s Motion to Dismiss. Discovery is not needed “to confirm that Caesars is in Nevada and/or that [M&M] knew that [he] lived, worked, and earned his wages in Nevada,” because M&M has conceded these facts for purposes of its Motion. His unsupported speculation that unidentified evidence will be lost or destroyed is baseless and insufficient. *See, e.g., Ali v. JP Morgan Chase Bank*, 2014 WL 12691084, at *1 (N.D. Cal. Mar. 10, 2014) (granting a stay where the plaintiff failed to “point to any specific witness or type of evidence that is actually at risk of being lost.”); *Murphy v. DirecTV, Inc.*, 2008 WL 8608808, at *3 (C.D. Cal. July 1, 2008) (“While the Court recognizes that delaying the proceedings will likely impose some burden on Murphy and the prospective class members, any risk of lost evidence is entirely speculative at this point.”).¹²

¹¹ Prejudice is not one of the factors courts consider in determining whether to stay discovery pending resolution of a potential dispositive motion. *See Kor Media Grp., LLC v. Green*, 294 F.R.D. 579, 581 (D. Nev. 2013) (“Courts in this District have formulated three requirements in determining whether to stay discovery pending resolution of a potentially dispositive motion; motions to stay discovery may be granted when: (1) the pending motion is potentially dispositive; (2) the potentially dispositive motion can be decided without additional discovery; and (3) the Court has taken a “preliminary peek” at the merits of the potentially dispositive motion and is convinced that the plaintiff will be unable to state a claim for relief.”).

¹² Peters’s reliance on *Richardson v. Verde Energy USA, Inc.*, 2016 WL 4478839, at *2 (E.D. Pa. Aug. 25, 2016) is misplaced. In *Richardson*, the defendant filed a motion to stay proceedings pending decisions from the United States Supreme Court in *Spokeo, Inc. v. Robins*, and from the Court of Appeals for the District of Columbia in *ACA Int’l v. F.C.C.* *Id.* at *1. Because of the uncertainty regarding when the D.C.

There is no “additional urgenc[y]” to conduct discovery in this case. *See* Doc. No. 30 at 14:14-22. Peters cannot even articulate what discovery he claims he needs. The filings in the ongoing state court litigation do not create any urgent need for discovery in this case. Indeed, M&M’s serving the underlying pleadings on Peters’s counsel in this matter and nothing is prohibiting them from responding or objecting where they deem appropriate. Tellingly, they have not challenged the propriety of the garnishment in the state court case. Additionally, Peters admits he is no longer employed at Casears, *see* Doc. No. 14:17-19, and therefore his wages are presumably no longer being garnished. Peters will not suffer any prejudice if discovery stayed while the Court resolves M&M’s Motion to Dismiss.

III. CONCLUSION

For the foregoing reasons, and the reasons set forth in its opening memorandum, M&M respectfully request the Court issue an Order staying discovery in this matter pending a ruling on the Motion to Dismiss the First Amended Complaint.

DATED: January 10, 2019

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Circuit Court of Appeals in *ACA Int’l* was going to make its final determination and how that decision would impact the case, the court denied the motion for a stay. *Id.* at *3. In addition, the court noted that the plaintiff “will still have to conduct discovery on the composition of the defendant’s dialing systems regardless of the outcome of the ACA case.” *Id.* Here, as discussed above, M&M’s pending motion to dismiss is dispositive of the entire case. No additional discovery is needed.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on January 10, 2019, I electronically filed the attached document to the Clerk's Office using the CM/ECF system for the United States District Court for the District of Nevada. I further certify that the following counsel for Plaintiff are registered CM/ECF users and that service will be accomplished upon them using the CM/ECF system:

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